

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PAYNE ELECTRIC COMPANY, INC.

and

Case 9--CA-34615

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL
UNION 369, AFL-CIO

Theresa Donnelly, Esq., of Cincinnati, OH, for
the General Counsel.

*Rayford T. Blankenship, Dave Crittendon,
and Stephen D. Lepage, (R. T. Blankenship
and Associates)* of Greenwood, IN, for the
Respondent.

William G. Finn, of Louisville, KY for the
Charging Party.

DECISION

Statement of the Case

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Louisville, Kentucky on December 17, 18 and 19, 1997, and on January 27 and 28, 1998. Upon a charge filed by the Union, International Brotherhood of Electrical Workers, Local 369, AFL-CIO on February 6, 1997,¹ and an amended charge filed by the Union on March 5, the Regional Director of Region 9 issued a complaint on July 3 against the Company, Payne Electric Company, Inc.. The complaint alleged that the Company had violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, (29 U.S.C. 151, et seq.) referred to as the Act, by maintaining an employment policy which discriminates against job applicants because of their union membership, and by refusing to hire and consider for hire employee applicants Ed Devine, Rita Wood, Brian Vandenburg, Ed Morrison, Roger Osbourne, Dave Adams, Eugene Ramey, and Dennis Sells because of their affiliation with, and activity on behalf of, the Union and to discourage employees from engaging in union activity. The Company filed a timely answer denying that it had committed the alleged unfair labor practices.

¹ All dates are in 1997 unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Company, I make the following

5 Findings of Fact

I. Jurisdiction

10 The Company a corporation, is an electrical contractor in the construction industry at its facility in Louisville, Kentucky. During the 12 months ending on July 3, the Company performed services valued in excess of \$50,000 in states other than the Commonwealth of Kentucky. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and
15 that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Facts

20 The Company is a non-union electrical contractor performing electrical construction for residential, commercial and industrial structures. The Company obtains its work by competitive bidding against other contractors. The Company's
25 president testified that it obtains work by bidding "low with the right amount of information." Robert Corrigan has owned the Company since its inception in 1956. Since March 1997, Terry Hansen has been its president. The Company hired Hansen as an electrician in February 1978. He is a licensed electrician. Thereafter, in 1994 or
30 1995, the Company promoted Hansen to vice-president/treasurer. Following his promotion to vice-president/treasurer and until March 1997, Hansen did all the interviewing of job applicants and made all the hiring decisions for the Company. After March 1997, other Company officials began doing some of the interviews of job applicants. However, Hansen continues to make the final hiring decisions.

35 The Union, represents approximately twelve or thirteen hundred journeymen electricians referred to as wiremen, and other classifications under a collective-bargaining agreement with the Louisville Chapter National Electrical Contractors Association, Inc., effective from June 1, 1996, until June 1, 1999. Approximately 50
40 contractors, of which 35 are local, are signatories to this agreement.

In April 1996, *Cockshaw's Construction Labor News & Opinion*, a newsletter issued from Newtown Square, Pennsylvania, carried a headline announcing that the Union's parent, International Brotherhood of Electrical Workers was escalating its
45 organizing campaign, known as COMET (Construction Organizing Membership Education and Training). I find from Hansen's testimony that the Company received a copy of this newsletter and that he had seen it prior to the alleged refusals to consider and hire the alleged discriminatees. Continuing, the headline reported that IBEW's spring organizing drive would attack "open shop's skills supply."

The first two paragraphs of the article presented remarks by IBEW's director of construction organizing, Jim Rudicil. First, Rudicil asserted: "Open shop electricals now suffer from manpower shortages and we plan to make that situation much worse in the months ahead." In the next paragraph, Rudicil explained: "To do this, we'll accelerate the COMET organizing/salting' campaign and use new tactics specifically designed to dry up non-union manpower."

Later in the article was a discussion of IBEW's plan to step up its campaign to organize individual employees. The article mentions "stripping," as the program which IBEW would implement to achieve its purpose. Rudicil explained that "stripping" was a program in which IBEW offered union membership to unorganized individual craftsmen. Continuing, the article presented what Rudicil viewed as the benefits of stripping to the IBEW. He asserted: "It takes their skills away from our competition and allows us to place them as "salts" with open shop employers we target. Moreover, it forces open shop contractors to pay higher wages and fringes to try and keep people we're trying to organize. The article goes on to describe how IBEW uses stripping to attract individual electricians to membership in an IBEW local and obtain their help to attempt to organize his or her current employer, or to work for a non-union employer as a "salter" and thus assist IBEW in organizing that employer.

On or about June 17, 1996, the Union sent a letter to the Company, which Hansen was aware of and had seen by the time of the alleged unlawful refusals to hire and consider the alleged discriminatees. The letter reflected IBEW's intentions as stated in Cockshaw's, and summarized above. The letter's first three paragraphs announced:

IBEW Local Union 369 wishes to extend the offer to organize your shop, from the top down, one more time. We now have Phase II Organizing Offensive in place and will begin its implementation on July 1, 1996.

Phase II has many parts and will be carried out with the drive of a mad dog in a meat house. We will be stripping journeymen and estimators. These individuals will know they can contact any IBEW Local Union nationwide for organizing updates. As you may guess, our contractors are swamped with work. I have assured the IBEW employers that as long as there is a unorganized man working in the jurisdiction of IBEW Local 369, I will guarantee them manpower.

If I don't have manpower available, I will strip as many as we need from the open shop competition. We will get all qualified electricians Union wages and benefits, one way or the other.

The Union's letter also warned the open shop contractors that:

IBEW Local 369 will be policing all prevailing wage jobs, making employees aware of the rate they are to be paid and filing any wage violation complaints on behalf of the employees. We will inform workers of their rights under N.L.R.A. and OSHA at the job sites, the supply houses and the schools. We only want what is right for all working people.

I find from President Hansen's testimony that from October 1996 until February 1997, the Company's average hourly wage for its journeymen electricians was approximately \$8.79. I also find from his pre-trial affidavit that the range of the Company's hourly wages for newly hired electricians in January 1997, was between \$8.50 and \$11.50. At that time, the Company's highest hourly wage for a journeyman electrician was \$13.75. I find from Hansen's testimony that he does not consider for hire or hire applicants who previously earned a higher wage than the Company can or is willing to pay. According to Hansen, the Company has adhered to this policy, unless it is in "dire circumstances." I also find from Hansen's testimony that his understanding of "union scale" was "twenty-one dollars or more an hour."

Under the Union's current collective-bargaining agreement with the Louisville Chapter National Electrical Contractors Association, the industrial hourly wage for a journeyman electrician, effective June 1, 1996, was \$21.25. Effective the following June 1, that rate increased to \$21.75. The collective-bargaining agreement provided a commercial hourly rate of \$18.70, effective June 1, 1996. As of June 1, 1997, that rate increased to \$19.50.

In Hansen's view, an applicant, who has had many short term jobs has a poor employment history. He testified that such a history is "not the strongest [factor in his consideration] but it's a pretty good factor. . . ."

I find from the testimony of the Union's organizer, William G. Finn that at all times material to this case, the Union has operated a hiring hall which refers laid off journeyman electricians² and apprentices to employment under the collective-bargaining agreement. I find from Finn's uncontradicted testimony that the electricians and apprentices, who rely on the Union for job referrals, are sent to jobs that require "a great deal of men for a short time." As a result of the peaks and valleys in the availability of jobs through the Union's referral system, the Union's members work on a number jobs in a year. I find from Finn's testimony that: "It would be nothing to have a guy with six or seven W-2's at the end of the year. That's just the way the business is."

I also find from Finn's testimony that electricians obtaining job referrals through the Union may be needed on a job site for only 2 weeks and that a 6-month job "is a pretty good length of time for a construction project. When the job is over, whether it be after 2 weeks or 6 months, and the employer has laid the electricians off, they return to the Union's office, sign the out-of-work book and wait for another referral. I find from Finn's testimony that there are contractors, covered by the collective-bargaining agreement, who maintain a core of 20 to 50 employees and will obtain several hundred additional employees from the Union as needed.

On September 5, 1996, the Company ran a classified advertisement in the *Louisville Courier-Journal* seeking to fill a "[c]ommercial & residential construction electrical position." On September 17, 1996, David Hill arrived at the Company's office

² Finn also refers to journeyman electricians as "wire men."

where he obtained and began filling out an application. He did not know the addresses of his references and he asked the Company's receptionist if he could take the application home. The receptionist replied that he must complete the written test attached to the application. She also reported Hill's request to Terry Hansen.

Hansen invited Hill into his office and interviewed him. Hill's application showed that he had "3 years in the IBEW (JATC)." This assertion was in response to the application's question: "Have you had any special courses in the electrical field?" After checking a box marked "yes," Hill had complied with the application's request for the name and description of his training. Hansen asked Hill about his previous employment with the IBEW. Hill explained that he had worked under NJATC, the IBEW's apprenticeship program, in Georgia for two years and had dropped out of it when he moved up to Louisville. Hansen remarked that he was "leery of hiring anybody that had dealt with the Union or had been in the Union." Hill told Hansen that he had dropped out of the Union and that he presently had nothing to do with the Union. Hill, sensing that Hansen did not believe him, repeated his assertion that he no longer had anything to do with the Union. Hansen hired Hill as a helper, effective September 23, 1996, at an hourly rate of \$8³.

At all times material to this case, alleged discriminatees Dave Adams, Eugene Ramey, Brian Vandenburg, Dennis Sells, Rita Wood, Ed Devine, Ed Morrison, and Roger Osbourne were Union members and "salts." As "salts," all eight were participants in the Union's COMET II program. I find from Union organizer Finn's testimony, that salting is a form of organizing. Finn trained the alleged discriminatees in the Comet II program before they applied for employment at the Company. He explained to them that "salting" means "systematically placing union members on non-union jobs for the purpose of organizing." According to Finn's credited testimony:

If a guy is interested in helping to organize a company, he can help us by going to work there. Show them that he is a good electrician, that --you know, get rid of some of the myths about the Union and explain to guys one on one about what the benefits are.

Finn also issued an information check list to each alleged discriminatee suggesting that they collect information about the employees they might encounter while acting as salts, including names, addresses, wage rates and classification, work experience, attitudes toward supervisors, fellow employees, attitudes about unions and

³ Hansen testified that he asked Hill to explain what "JATC" meant. When Company counsel, resorting to a leading question, asked if he, Hansen, had ever told Hill that he was "leery about hiring someone associated with the Union during this interview," Hansen testified "I definitely did not."

The Company urges me to reject Hill's testimony on the ground that the Union paid him to testify. The record shows that the Union issued a check in the sum of \$80.21 as net pay for the day's wages Hill lost when he appeared as a witness before me on December 17. Thus, it is suggested that Hill had an economic incentive to testify as he did. However, as Hill testified in a frank manner, on direct examination and on cross-examination, I have credited his version of his interview with Hansen on September 17, 1996.

nepotism. The check list also suggested obtaining information about the job and the company and about possible violations of the Act, OSHA, and state workers compensation and unemployment insurance fund regulations.

5 On October 9, 1996, during a COMET meeting, Finn discussed seeking employment. He remarked that the Company might be taking employment applications. After the meeting ended, Union members Eugene Ramey, Brian Vandenburg, Dennis Sells and Dave Adams decided to file some job applications at
10 various employers including the Company. They traveled in Adams' car. When they arrived at the Company, Ramey, Sells and Adams entered the office and obtained applications. At first, Vandenburg did not enter the office. He arrived as the others were filling out applications.

15 Ramey, a journeyman wireman⁴ since 1992, arrived in the Company's office wearing an IBEW T-shirt and a hat with a Union insignia on it. He completed an employment application, filled out an attached *Electrical Knowledge Questionnaire* and gave it to the Company's receptionist.

20 The application showed that Ramey was applying for a position as an electrician and that the salary required was "neg." Under *Previous Employment*, Ramey showed that from December 1994, until September 1996, he had worked for five employers, and, that his longest length of service during that period had been 11 months, with
25 Raytheon, in Louisville. He showed that he had worked 1 month for Delta Electric, 2 months each for Abell Electric and Long Electric, and 3 months for Ready Electric. Ramey's application reflected that his hourly wage during those five jobs had ranged from \$20.94 to \$21.65. He wrote that his reason for leaving each job was "ROF," a
30 reduction in force, also referred to by Ramey as a layoff.

Ramey provided three references, Bill Finn, the Union's organizer, Union representative Steve Silliman, and Terry Luckett, the Union's Business Manager. The application shows that Ramey has 4 years of industrial electrical experience, 2 years of
35 commercial electrical experience, and 1 year each of service maintenance and residential electrical experience. His application states that the "Union Hall referred him to the Company.

40 David C. Adams, a journeyman wireman, and a Union member since 1978, was laid off when he filed his application with the Company on October 9, 1996. When he arrived at the Company's office on October 9, 1996, he was wearing a jacket with an IBEW emblem on it. Adams' application showed that he was applying for an electrician's position and that his salary requirement was "union scale or anything."
45 Adams stated that he had attended the Union's apprenticeship school; that he had worked for one employer from December 1992 until October 1996. He also wrote that he had worked for another employer for three years, and had worked for one and a half years each, for two other employers. Adams' application did not reveal the wage rates

⁴ I find from Finn's testimony that "journeyman wireman" is synonymous with "journeyman electrician."

he had experienced in these previous jobs. He provided three references, Finn, Lockett and a Union business agent, Bill Zipfel.

Adams' application showed previous electrical experience, including 15 years each of commercial and industrial work and 2 years each of service maintenance and residential work. Adams' application showed that "L.U. 369 referred him to the Company. Hansen admitted that when he reviewed the applications involved in this case, he knew that Bill Finn was a Union organizer and that L.U. 369 was the Union.

Dennis Sells submitted an application to the Company on October 9, 1996, showing that he was seeking an electrician's position and that the salary required was negotiable. He arrived at the Company's office on that date, wearing a jacket with an IBEW emblem on it. Sells' application stated that he had served an "IBEW Apprenticeship."

Sells' application reported that from January 1993, until September 1996, he had worked for three employers. The earliest of these jobs had lasted from January 1993 until November 1993. Sells next job had extended for 8 months, beginning in January 1994. His last job began in November 1994, and ended with a layoff in September 1996. In each instance, his reason for leaving the job was lack of work. In the earliest of these jobs, his hourly rate was \$20.25. In the next job, he received an hourly rate of \$20.94. In the last job, he had received \$21.25 per hour. Sells gave three references, Finn, Lockett, and Silliman. Sells' application showed a total of 23 years in commercial electrical work, 15 years in service maintenance work, and 6 years of industrial experience. According to the application, Bill Finn referred Sells to the Company.

Brian Vandenburg filed a job application with the Company on October 9, 1996, and a second application on January 13. When he arrived at the Company's office on October 9, 1996, he asked the receptionist if it was a union employer. The receptionist said "No."

In both applications, Vandenburg showed a desire for an electrician's position. In the first application, he did not fill in the blank next to "salary required." In his later application, Vandenburg wrote "negotiable" in the "salary required" space.

In the October application, Vandenburg showed five jobs between February 1994 and September 1996. Two of these jobs lasted 2 months each. Vandenburg showed that he worked for AES from February 1996 until April 1996, and then worked for the same employer for 4 months, from May 1996 until September 1996. The same application showed that he worked for Ready Electric from June 1995, until December 1995, and for Arrow Electric from April 1994 until June 1995. Vandenburg revealed that his reason for leaving each of the last three jobs was that he was laid off. He quit the Arrow job "to go in union." His reason for leaving Ready Electric was to return to work at Arrow in April 1994.

His hourly wage at Ready was \$20.94. His hourly rate at AES during his initial 2-month employment, was \$20.94. From May 1996 until September 1996, his hourly rate at AES was \$21.25. The October 1996 application showed that Vandenburg's hourly

rate at Trans Electric, in 1994, was \$10.00 and that at Arrow Electric he received \$12.75 per hour. Vandenburg's references were Terry Luckett, Bill Finn and Steve Silliman. According to Vandenburg's October 1996 application, Silliman was an "Asst. BA." This application stated that a newspaper referred Vandenburg to the Company.
5 The October 1996 application reported that Vandenburg's electrical experience included 5 years' commercial work, 2 years of industrial work and 3 years of residential work.

10 In his application of January 13, Vandenburg omitted Arrow Trans Electric from his list of previous employers. He added United Electric and Tradesmen Int. to the list. In the earlier application, Vandenburg had stated that his first period of employment at AES had been from February 1996 until April 1996. In the later application,
15 Vandenburg claimed that his initial stint and AES had been from January to February 1996. In the October application, Vandenburg did not show the kind of work he had done at any of the listed previous employers. In the second application, he took the trouble to describe the work he did for each of the five listed employers. The later application also showed that he received union scale wages at all but one of the listed employers. At Tradesmen Int., his hourly wage was \$11.
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In his January application, Vandenburg gave five references. He listed Luckett, Finn, Silliman, and two more Union officials, President Scott Pulliam, and Business Agent Ziphel. The second application stated that the "*Courier Journal* and Bill Finn
25 Local 369" had referred Vandenburg to the Company.

In his second application, Vandenburg claimed 8 years of commercial electrical experience, 5 years of industrial electrical experience, and 3 years of residential electrical experience. Also, in the second application, Vandenburg claimed that he had
30 taken a "journeymens prep course to take FL block test-passed." This claim was in response to a question on the form, which asked for the name and description of any special courses in the electrical field. In his first application, Vandenburg did not mention this course. Instead, he claimed a basic U.S. Navy electricity and electronics course in his response to that question.
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Hansen never interviewed or contacted Ramey, Adams, Sells, or Vandenburg. The Company had placed an ad for an electrician in *The Courier-Journal* of September 5. Hansen testified that he assumed that the position had been quickly filled. There
40 was no showing that as of October 9, 1996, the Company was seeking electricians. Indeed, I find from Hansen's testimony that the Company was not actively looking to hire any new electricians in October 1996. His testimony shows that he reviewed Ramey's, Adams' and Sells' applications and Vandenburg's first application soon after they were filed. However, I also find from Hansen's testimony that when he is ready to
45 hire one or more electricians, he considers applications filed during the previous three months. His view is that applications older than three months are stale on the ground that the applicant has "gone out to greener pastures. . . ." Hansen's testimony shows that he reviewed Ramey's, Adams', Sells', and Vandenburg's October applications. He found none of the four worthy of an interview.

Hansen testified that he saw from Adams' application that he wanted union scale wages. From this, Hansen concluded that Adams wanted \$21 or more per hour. Hansen testified that he "wasn't really interested in interviewing this individual on that basis."

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After he submitted his application in October 1996, Adams telephoned the Company twice. The first instance was in November 1996. He called and asked if they were hiring. The woman, who answered said no. He called again in February and asked the same question. The person who answered said no. He asked something about how long an application was good. The answer was she didn't know and he could submit a new application.

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With respect to Sells, Hansen testified that he saw that the application stated that the required salary was negotiable. However, Hansen testified that he also saw that Sells was "used to making over twenty-one dollars an hour." According to Hansen, from this fact, he reasoned that even if he were able to hire Sells "at a lot less than that he would not be satisfied with what I was paying him and he would not be a good employee." Hansen decided not to interview Sells.

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On direct examination counsel for the Company asked Hansen if he would absolutely refuse to interview Ramey. Hansen answered:

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No. I wouldn't absolutely refuse. I mean, if I got a recommendation from— not only my supervisors but external sources from Payne that this guy was a legitimate reference, I would probably might have considered him.

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In January, after receiving Vandenburg's second application, dated January 13, Hansen testified that he had considered interviewing Vandenburg for employment as an electrician, notwithstanding Vandenburg's history of union scale wages. Hansen testified that he considered lowering the Company's standards "because we were desperate for people at that time. . . ." However, Hansen found out that Vandenburg had submitted another application in October 1996. Hansen testified in substance that upon comparing the two applications he noted that Vandenburg had "gained three years' experience in a couple of months' time." According to Hansen's further testimony, he concluded from this discrepancy that Vandenburg "was falsifying documents here. . . ." Continuing, Hansen testified: "I won't consider anybody for hire that's falsified documents."

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On November 11, 1996, out-of-work Union members Edward J. Devine, III, and Rita Wood, both journeyman electricians, attended a COMET class at which Bill Finn remarked that the Company, among other employers, might be hiring electricians. The two filed employment applications at the Company's office on November 14, 1996. Wood, the Union's Vice-President has been a Union member for over 12 years. When she filed her application on November 14, 1996, she was wearing a jacket with showing the Union's logo. Devine, who accompanied her, has been a Union member for over thirty-one years. As they submitted their applications, Wood asked if the Company was hiring. The receptionist said she wasn't sure that it was.

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Devine's application stated that he was seeking a wireman's position. He left the "salary required" space blank. He inadvertently checked the "no" space next to the question: "Do you have a valid drivers license?" However, he filled in the remaining spaces pertaining to that question. He showed that he had a Kentucky operator's license, number "401-60-56521" and that it had not been suspended or revoked. The application states that Devine's education included NJATC, the National Joint Apprenticeship and Training Committee, administered by the International Brotherhood of Electrical Workers and National Electrical Contractors Association, Inc. (NECA). Devine listed 5 different jobs between July 21, 1994, and September 5, 1996. He reported that he quit 2 of the jobs. The first time, he quit to come back to Louisville from Indianapolis. The second time, he quit to "get better, longer job." He showed that his hourly wage in these jobs ranged from \$19.94 to \$20.94. He provided two personal references. Neither is identified with the Union.

Devine's application recited that his electrical experience included 10 years of commercial work and 20 years of industrial work. It also stated that he had a total of 32 years of electrical work. The application reported that Bill Finn referred Devine to the Company.

Hanson's testimony was that he reviewed Devine's application and then considered what he, Hanson, believed were the most important aspects of its contents. He noted that Devine sought a wire man position, which he, Hanson assumed to be "electrician." Later in the hearing before me, Hanson testified that he was unfamiliar with "wire man," that it did not "mean a whole lot" to him, and that the Company had no classification by that name.

Hanson testified that he noted that Devine's customary hourly wage was over \$20 and assumed that he would want the same wage at the Company. According to Hanson, that wage was out of the Company's range. Hanson also testified that he saw that Devine's work history "was quite erratic." Having made this assessment, Hanson testified he decided that he would not consider Devine for interview. When asked about any other reason, Hanson testified that he noted that Devine did not have a valid drivers license and that the absence of such a license is a very strong factor in his evaluation of a job applicant.

Rita Wood's application showed that she was seeking a position as a journeyman wireman and the salary was negotiable. Wood's application showed that she had received apprenticeship training from the Louisville Joint Apprenticeship and Training Committee, which is administered by the Union and the Louisville Chapter of NECA. Wood reported that her recent employment consisted of 4 jobs between late 1993 and September 1996. Their duration ranged from 2 weeks to fifteen months. One job's duration was 3 months. She worked for ten months on another of the 4 listed jobs. She showed that her hourly wages on these 4 jobs ranged from \$19.44 to \$21.25.

Wood's application stated that she had a total of eleven years' experience in the electrical field. She also asserted that she had eleven years' commercial experience and the same number of years of industrial experience.

Wood's application showed 5 references. Of these, she identified 4 as being business agents. These 4 included Terry Luckett, the Union's business manager, and Union business agents Bill Finn, Steve Silliman, and Bill Zipfel. Wood's fifth reference was Terry Jordan, whose occupation is described on the application as "factory." Wood's application stated that Bill Finn referred her to the Company.

Hanson testified that he noted that Wood's customary hourly wage was more than \$21, which was beyond the Company's "realm of consideration." He also testified that he assumed that "negotiable would be similar too." According to Hanson, even if he hired Wood "at a lot less...she would not be satisfied. She would become a dissatisfied employee."

The Company ran an advertisement in the *Louisville Courier-Journal* from January 10 through January 16. The advertisement announced that the Company had "immediate openings for commercial & residential electricians." Continuing, the ad specified: "Person must have electrical construction experience." The ad contained no reference to either the Company's wage policy or its policy regarding short job tenure.

On January 10, George Oswald appeared at the Company's office and filed an application for an electrician's position. Oswald's application was silent regarding his salary requirement. In the space reserved for training, Oswald explained that he had been "in the Union for 2 yrs. in they're school." He also showed that he had held two jobs since January 1994. The first, began in January 1994, and ended in February 1995, at an hourly rate of \$7.50. Oswald's second job began in February 1995 and was in progress at the time he filled out his application. His hourly rate in this job was \$10.50. His application showed 1 year of residential electrical experience and 6½ years' commercial electrical experience. Oswald's application did not reveal his total years of electrical experience.

According to Oswald's application, he was referred to the Company by "Paper." His personal references did not include anyone identified with the Union. There was one truck driver, a carpenter, a roofer, and two housewives.

Hansen studied Oswald's application and interviewed him on the same day Oswald submitted it. Hansen asked a variety of questions regarding the application. He asked if Oswald was involved with the Union. Oswald answered no and added that he had been out of the Union for 3 years. Hansen asked about Oswald's wage need. Hansen asked why he was no longer in the Union. Oswald explained that the Union had dismissed him from the apprenticeship program after two unionized employers, respectively, had discharged him for missing days. Hansen asked Oswald what wage rate he required to come to work for the Company. Oswald replied "eleven dollars an hour." Hansen offered him a job at \$10.50 per hour. Oswald said he would think about this offer. On the following day, Oswald called Hansen and declined the job offer.⁵

⁵ On direct examination, in response to leading questions by the Company's consultant, Hansen denied asking Oswald about his training relationship with the Union and about whether

On January 13, Edward A. Morrison, Terry A. Osbourne, and Brian Vandenburg attended a COMET class at which Finn announced that the Company was taking employment applications. Finn suggested that the assembled Union members go to the Company's office and apply for work. Following the class, Vandenburg and Morrison drove together, Osbourne drove by himself, to the Company's office. They arrived in the Company's office together. Morrison was wearing a jacket with union lettering on it. Vandenburg was wearing an IBEW t-shirt. The three asked the Company's receptionist for, and received applications. They promptly filled them out and returned them to her.

I have reviewed Vandenburg's application of January 13, above, at pages 8 and 9. I have also set out Hansen's explanation of his rejection of Vandenburg for consideration as a job applicant.

Edward A. Morrison, has been a Union member since 1979. His application for employment at the Company showed that he was a journeyman electrician and that the matter of required salary was negotiable. Morrison's application showed that he had a valid Kentucky drivers license and that in 1982, he had completed the Louisville joint apprenticeship training course conducted by the Union and the local chapter of the National Electrical Contractors' Association.

His application showed that from October 1995 until January 1997, Morrison had worked for four employers. Morrison reported 1 month's tenure at two of these jobs. Of the remaining two jobs, one was of 4 months' duration. The other lasted 2 months. His hourly wage rates in these 4 jobs ranged from \$18.00 to \$21.25. At the time he applied to the Company, he was unemployed. Morrison's application showed 15 years' commercial and industrial experience as an electrician. He also claimed a total of 18 years' experience in the electrical field.

Morrison's application shows that Bill Finn, a Union organizer referred him to the Company. The application lists under "Personal References" Terry Luckett, Bill Finn, and Steve Silliman and identifies them as officials of the Union.

Hansen reviewed Morrison's application and noticed that it stated that salary was negotiable. However, Hansen also saw that Morrison "was used to making twenty-one twenty-five an hour." Hansen explained that because the Company was busy in January, he would have considered Morrison for hire. Consequently, Hansen wrote "maybe" on the upper right hand corner of Morrison's application. Hansen further testified in substance that in the case of Morrison, the Company would have been "[w]illing to lower our standards somewhat to—if we had to go ahead and get people in there to work for us." According to Hansen, there were sufficient applications from "[m]ore desirable people and that's why Mr. Morrison was not contacted for interview."

he was currently an active Union member. The Company's consultant did not allow Hansen to venture beyond the negative or affirmative responses called for by the consultant's leading questions. In contrast, Oswald testified in a candid manner as he provided his recollection of portions of their discussion relating to his training and relationship with the Union,

Upon further examination by Company counsel, Hansen agreed that, if Morrison's wage history had shown \$11 per hour, it was more likely that the Company would have hired him.

5 Although his application for employment by the Company as an electrician shows 1996, Roger Osbourne filed it on January 13. Osbourne's application also stated that the salary desired was \$11, he wrote in the same space, that the stated figure was negotiable. He joined the Union in 1996 and was a journeyman electrician
10 when he joined.

 Osbourne's application shows jobs with five previous employers. Their duration varied from 3 years and 4 months to 1 month and 12 days. Two of Osbourne's former jobs were in excess of 3 years' duration. One lasted for 2½ years. Of the remaining
15 two jobs, one was a little over 1 month in duration and the second lasted for approximately 2 months and 3 weeks. Osbourne's application shows that he has accepted hourly wages of \$7, \$6.25, and \$10. However, in the two most recent jobs, respectively, Osbourne's hourly wages were \$21.80 and \$22.93. At the time he filed his application with the Company, Osbourne was unemployed.
20

 Osbourne's application showed that he had a total of seven years' experience in the electrical field. He claimed 2½ years' experience in commercial work, 1 year in industrial work and 1½ years in residential electrical work.

25 In the application's space for explaining how the applicant was referred to the Company, Osbourne answered that it was the newspaper advertisement in the *Louisville Courier Journal*. Osbourne's application shows two personal references, Tim Kelly and Joe Dye. The application lists Kelly's occupation as "E.M.S." and Dye's
30 occupation as "Maintenance."

 Hansen testified that he did not interview Osbourne because the application showed that "he didn't have the work history to really consider this guy as an
35 electrician." Hansen considered Osbourne's 1 year in industrial work and 1½ years in residential as inadequate experience. According to Hansen's testimony: "A guy with that little of experience wouldn't be capable of running a truck and that's what we're looking for in an electrician." A further factor in Hansen's decision to pass over
40 Osbourne, was that this applicant "was used to making over twenty-one dollars an hour" with "that little of experience" which "didn't make much sense to [Hansen]." Hansen also testified that Osbourne's application seemed "somewhat strained" and that "I didn't get a good feeling about it."

45 On cross-examination, Hansen agreed that one of the main reasons he didn't hire Osbourne was that this applicant did not have enough electrical experience. Further, Hansen testified, in substance, that he did not accept Osbourne's claim of seven years' experience in the electrical field. Instead, Hansen testified that after reviewing Osbourne's experience, as stated in the application, he, "got more feeling that he had like about 3 or 4 years' experience." Hansen's concluding testimony in this regard, was, "I didn't feel like he was capable."

Osbourne's application bears "maybe" on its upper right hand corner. Hansen testified that he wrote "maybe" on that application as a reminder that perhaps he should give Osbourne an opportunity to explain it in an interview. However, according to Hansen, "As it turned out, I did receive a lot more applications in there that were more desirable people and he was not contacted for interview." Continuing, Hansen answered: yes, when Company counsel asked him if he might have interviewed Osbourne if the Company had needed to hire more electricians.

From January 9 until January 27, the Company interviewed and hired electricians. Allen Wallace, Kevin Wilcher, William Allen, Thomas Rayhill, Joseph Christopher, John Donnelly, and Shaun Quick. The Company hired all seven as journeymen electricians. There was no information on their respective employment applications submitted to the Company suggesting past or present affiliation with the Union or any other labor organization.

Their hourly wage rates in previous employment ranged between \$5.75 and \$13.50. Allen Wallace's application shows that he required an hourly wage of \$10.50. Kevin Wilcher and Thomas Rayhill, respectively, gave no amount as a required wage. William Allen's application showed \$11.50 as his required wage. Joseph Christopher's application stated that his required salary was \$14 per hour. John Donnelly wrote "\$15 per hour" as his required salary. Shaun Quick's application stated that the required salary was "12.00." Quick's application also showed five previous periods of employment between April 1990 and October 1996. However, he reported only the hourly wage for his last job, which was \$11.50.

The range of experience in the electrical field was between Rayhill's five years and Donnelly's 24 years. Christopher claimed 6½ years of experience. Wilcher's application showed six years of electrical experience. Allen Wallace claimed almost nine years' electrical experience. Both William Allen and Shaun Quick showed eight years' electrical experience on their respective applications.

Christopher, Wilcher, Allen, Quick, Wallace and Donnelly, each, had a valid driver's license. Rayhill's application showed that he did not have a driver's license.

Hansen was less than consistent in requiring a valid driver's license as a prerequisite for employment by the Company. He hired Jerry Eigel as an electrician in September 1996, notwithstanding that Eigel's application showed that he did not have a valid driver's license. In 1996, Hansen also hired James Pryor, Shawn Browning and P. Scott Danks as helpers. Their applications show that neither Pryor, nor Browning, nor Danks had a valid driver's license. Steve Carter checked the no box signifying that he did not have a driver's license and then supplied information showing that he did have such a license. Hansen hired him as a helper on May 16. The applications of these four employees did not reflect any evidence of union membership or other contact with a union.

Analysis and Conclusions

The General Counsel urges me to find that the Company violated section 8(a)(1) and (3) of the Act by refusing to hire or consider for hire applicants Adams, Ramey, Sells, Devine, Wood, Vandenburg, Morrison and Osbourne because of their affiliation with the Union. The Company contends that it did not violate the Act on the grounds that Hansen rejected these eight applicants for economic reasons, and, further, that they were not statutory employees entitled to the Act's protection when they applied for employment by the Company.

In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185, 187-188 (1941), the Court recognized, in agreement with the Board, that job applicants are "employees" within the meaning of Section 2(3) of the Act, who may not be refused employment opportunities because of their adherence to a union. The Court observed that:

Discrimination against union labor in . . . hiring . . . is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. (313 U.S. at 185)

The Court's concern for the protection of the right of employees to assist a union in organizing fellow employees surfaced again in *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995). In that case, the Court endorsed the Board's determination that job applicants, who seek employment with the intention to organize an employer's employees, as part of a union's "salting" program, are "employees" within the meaning of Section 2(3) of the Act. 516 U.S. at 87-88 and 96-98.

Consistent with the Court's holding in *Town & Country*, supra, the Board has held that such employees described as "salts" are entitled to protection under the Act. *M. J. Mechanical Services, Inc.*, 324 NLRB No.130 (Slip op. p. 2, October 24, 1997). In *M. J. Mechanical Services*, supra (Slip op p. 3), the Board held that an employer violated Section 8(a)(3) and (1) of the Act by discharging 2 employees because they were salting, i.e. attempting to organize the employer's employees.

In the instant case, all of the 8 alleged discriminatees sought employment at the Company as part of the Union's campaign to organize non-union electrical contractors in the Louisville area. Prior to applying for employment at the Company, the eight salts had received training from Union organizer Finn under the COMET programs. They sought employment at the Company to assist the Union's organizing campaign. They intended to try to organize the Company's employees on the Union's behalf. Further, under the COMET program, if they could not attain that objective, the salts were expected to strip employees. "Stripping" meant that the salts were to recruit individual electricians to join the Union and seek employment at an employer covered by the collective-bargaining agreement between the Union and the Louisville Chapter of NECA. However, there was no showing in the record before me that any of the eight alleged discriminatees intended to follow the stripping procedure.

That the Union's stated policy was to require salts to quit their employment immediately, upon the Union's request, at a non-union job, if their effort to organize proved unsuccessful, did not deprive the eight alleged discriminatees of the Act's protection. *Town & Country Elec. Inc.*, 516 U.S. at 96. Further, even if the alleged discriminatees had been under instructions to engage in stripping, such conduct was part of their organizing effort on the Union's behalf, and would not remove them from the Act's coverage. *M.J. Mechanical Services*, 324 NLRB at slip op. p.2.

In the course of COMET training, Finn instructed the salts to collect information at their job sites regarding violations of the Act, violations of OSHA as it related to health and safety, and workers compensation and state unemployment insurance fund violations. In addition, Finn also instructed the salts that employers who rejected job applicants because of their union membership or pro-union sympathy engaged in unlawful conduct, which the Act would remedy at the employer's expense. However, there was no showing that Finn instructed the salts to entrap any employer into engaging in any unlawful conduct. Nor was there any showing that any of the eight discriminatees sought to entrap the Company, or Hansen, or intended to do so. Instructing the salts as to their rights under the Act and other statutes and alerting them to the need for gathering information relating to possible violations did not impair their right to the Act's protection. 324 NLRB at slip op. p. 3.

Here, there was no showing that any of the alleged discriminatees intended to sabotage the Company's business or its facilities, or engage in any unlawful conduct. Even if the eight salts in this case harbored such intent, they would yet be "employees" within the meaning of Section 2(3) of the Act. 516 U.S. at 96. In sum, I find that the eight alleged discriminatees in this case were, at all times material to this case, employees entitled to the protection of the Act.

An employer's refusal to hire or consider applicants for hire because of their union sentiment, membership or activities violates, Section 8(a)(3) and (1) of the Act. *Fluor Daniel, Inc.*, 304 NLRB 970, 970-971 (1991), *enforced mem.*, 976 F.2d 744 (11th Cir. 1992). Thus, the legality of the refusal to hire or consider the eight alleged discriminatees turns on the Company's motive.

Under Board policy, as set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402-403 (1983), the burden is upon the Board's General Counsel to show that the employees' union activity or sentiment toward a union were a motivating factor in the Company's refusal to hire or consider them for hire. Under the *Wright Line* standard, once that showing has been made, the Company's conduct will be found unlawful unless the Company shows, as an affirmative defense, that it would have refused to hire them or consider them for hire even in the absence of their adherence to a union. 462 U.S. at 395, 397-403. Accord: *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1179 (6th Cir. 1985). Further, when the record shows that the lawful reason or reasons which the Company has offered to explain its treatment of the alleged discriminatees did not exist or were not, in fact, relied upon, then the inquiry is at an end, and the

Company has not sustained its *Wright Line* defense. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced*, 705 F.2d 799, 800 (6th Cir. 1982).

5 Thanks to the April 1996 issue of *Cockshaw's Construction Labor News & Opinion* and the Union's letter of June 17, 1996, Hansen was well informed about COMET, the IBEW's organizing campaign and the Union's active participation in it. By the time the first of the alleged discriminatees appeared at his office, Hansen knew that their union intended to organize the Company with the help of "salts." He also knew
10 that Bill Finn was a Union organizer and that Terry Luckett was the Union's business manager, who had signed its letter heralding the organizing campaign.

15 The applications of the eight alleged discriminatees left no doubt of their involvement with the Union. Hansen easily saw the listed references naming Finn, Luckett and other Union officials. He also could see from many of the applications that Bill Finn or the Union had referred the applicants to the Company. Most of the applications showed apprenticeship training under a joint training program sponsored by the Union and the local chapter of NECA. All of the alleged discriminatees' applications revealed a history of union scale wages and short periods of employment.
20 In sum, I find that as he reviewed the applications of the eight alleged discriminatees, Hansen noted their ties with the Union.

25 The record also shows that Hansen was reluctant to consider applicants with apparent ties to the Union or to any union. In September 1996, Hansen in the course of interviewing Hill, a job applicant, remarked that he was "leery of hiring anybody that had dealt with the Union or had been in the Union." Later, in January, Hansen showed interest in George Oswald's assertion in his application that he had been in a union school for 2 years. In response to Hansen's question about this relationship with a
30 union, Oswald assured him that he had been out of the union for three years.

35 If there is any doubt as to Hansen's desire to keep the Company free of Union adherents, his criteria for considering job applicants should resolve it. Hansen refuses to consider for hire any applicant, who previously earned higher wages than the Company can or is willing to pay. The Company's hourly wage for electricians ranges between \$8.50 and \$11.50. A second factor, which Hansen considers before interviewing a job applicant, is an employment history of short-lived jobs. He views a series of short-term jobs as a poor employment history. However, these two factors
40 which bar applicants from employment by the Company are characteristics peculiar to electricians covered by the Union's collective-bargaining agreement with employers in the Louisville Chapter of NECA. Thus, such employees enjoy hourly wages of \$21.75 for industrial work and \$19.50 for commercial work. Additionally, the Union operates a referral system that supplies electricians to NECA employers for projects requiring large
45 groups of electricians for short periods. Thus, Hansen's criteria effectively bar Union adherents from employment by the Company. Under settled law, even without proof of unlawful motive, this hiring policy would be found violative of Section 8(a)(3) and (1) of the Act, despite evidence of business motivation, for it is inherently destructive of employee rights to adhere to a labor organization. *NLRB v. Great Dane Trailers, Inc.*,

388 U.S. 26, 34 (1967). However, here there is ample evidence to show Hansen's discriminatory motive.

5 Hansen attempt to show business-related reasons for his policy does not
withstand analysis. He testified that his experience showed, that employees
accustomed to working for Union scale would become disgruntled and perform
unacceptable work, if they agreed to work for lower wages. However, he did not
10 present any specific instance in which he was confronted with such disgruntlement
because an electrician accepted lower wages from the Company after working for union
scale. He also testified that employees with histories of short- term jobs were "having
problems." Absent was any elaboration of what such "problems" might be. Nor did
Hansen show that his experience showed that employees with such histories failed to
15 perform in a workman-like manner. Thus, I find that Hansen's explanation is
unsubstantiated.

20 Hansen's remark to Hill and his concern about Oswald's brief tie to a union show
that the motive for the Company's hiring policy was a desire to weed out the Union's
adherents. Thus, I find that Hansen's hiring policy, and its implementation, violated
,and continue to violate, Section 8(a)(3) and (1) of the Act.

25 Further evidence of Hansen's unlawful motive in his treatment of the eight
alleged discriminatees, is the Company's pattern of hiring in January, when the
Company needed electricians. The record shows that Hansen, who was processing
applications, did not consider any of these Union adherents for employment. He did not
contact any of them for an interview. Nor did he interview any of them. Instead, he
considered and hired seven electricians, none of whom had any apparent tie to the
Union or any other labor organization. From this factor and the evidence discussed
30 above, I find that the Acting General Counsel has shown that the adherence of the eight
alleged discriminatees to the Union was a motivating factor in his refusal to hire or
consider any of them for hire.

35 The Company's effort to show that Hansen's treatment of the eight alleged
discriminatees was unrelated to their union membership or pro-union sentiment falls
short of the mark. In response to the Acting General Counsel's evidence, the Company
presented Hansen's testimony explaining why he did not consider the applications of
the eight Union adherents. He testified in regard to each of these applications that he
40 rejected them for consideration because they each showed that the applicant was
accustomed to receiving union scale, which exceeded \$21 per hour. According to
Hansen, it would be a futile effort to negotiate with such applicants. Thus, Hansen was
implementing the unlawful policy, which he established to bar union adherents from
employment at the Company.
45

Hansen's flat refusal to try to negotiate with the Union adherents contrasts
sharply with his treatment of those whose applications showed no involvement with a
union. Joseph Christopher, a non-union electrician, wrote \$14 on his application, as his
required hourly rate. Hansen negotiated with Christopher and they agreed to a starting
hourly rate of \$10.50. Hansen noted that non-union electrician John Donnelly's job
application showed a required hourly rate of \$15. The stated requirement of \$15 did

not deter Hansen from negotiating and persuading Donnelly to accept an hourly wage of \$12.25. In contrast, Hansen declined to negotiate with any of the Union adherents, notwithstanding that some showed no required hourly rate, or that others wrote in “neg.” “negotiable,” or “11 per hour/negotiable”. Such disparate treatment of Union adherents adds further evidence of unlawful motivation.

Further evidence of Hansen’s anti-union bias surfaced in his attitude toward Devine’s inadvertent check mark on his job application showing that he did not have a valid driver’s license. Hansen testified that one of his reasons for not considering Devine’s application for employment was that Devine lacked a driver’s license. Hansen also testified that the absence of such a license was a very strong factor in his evaluation of a job applicant. Yet the record shows that Hansen hired electrician Jerry Eigel and helpers Pryor, Browning and Danks, all of whom had no apparent ties to a union, and had no driver’s license.

Hansen testified about other reasons for his refusal to consider Vandenburg and Osbourne. Review of those reasons suggests that they are pretextual. Hansen reviewed Vandenburg’s two applications and found that the second application claimed three more years of experience than the first application had shown. From this one discrepancy, Hansen concluded that Vandenburg “was falsifying documents here. . . .” Hansen went on to declare: “I won’t consider anybody for hire that’s falsified documents.” I find that Hansen’s conclusion is a gross exaggeration of sufficient magnitude to suggest that he was attempting to shore up what he feared were inadequate reasons for rejecting Vandenburg’s application. Again, Hansen never gave Vandenburg an opportunity to explain this discrepancy.

Hansen testified that he did not interview Osbourne because the latter’s application showed that he did not have enough work history to qualify him as an electrician. Upon further questioning, Hansen testified that even though Osbourne claimed seven years’ experience as an electrician, he, Hansen “got a feeling that he had less years” and “didn’t feel [Osbourne] was capable. Examination of Osbourne’s previous employment, beginning in 1990, shows that he had seven years’ employment as an electrician. He claimed seven years’ experience in the electrical field on the portion of his application pertaining to experience. His history of employment corroborated his claim of seven years’ electrical experience. Hansen offered no evidence to support his “feeling.” Here, again, I find Hansen’s proffered explanation was a pretext for refusing to consider a Union adherent for employment.

In sum, I find that the Company has failed to rebut the Acting General Counsel’s showing that the 8 alleged discriminatees’ adherence to the Union motivated Hansen’s refusal to hire any of them or consider any of them for hire. Accordingly, I find that by Hansen’s discrimination against job applicants Ed Devine, Rita Wood, Brian Vandenburg, Ed Morrison Roger Osbourne, Dave Adams, Eugene Ramey and Dennis Sells the Company violated Section 8(a)(3) and (1) of the Act. *Kentucky General, Inc.*, 324 NLRB No. 166 (slip decision p.1, n. 3) (November 7, 1997).

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material to this case job applicants Ed Devine, Rita Wood, Brian Vandenburg, Ed Morrison, Roger Osbourne, David Adams, Eugene Ramey, and Dennis Sells were employees within the meaning of Section 2(3) of the Act

4. The Company has violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing a policy of refusing to hire employment applicants with histories of short-term employment or earnings substantially in excess of its wage rates.

5. The Company has violated Section 8(a)(3) and (1) of the Act by refusing to hire or consider for hire employee applicants Ed Devine, Rita Wood, Brian Vandenburg, Ed Morrison, Roger Osbourne, Dave Adams, Eugene Ramey and Dennis Sells.

Remedy

Having found that the Company has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I recommend that the Company be required to cease maintaining and enforcing its policy of refusing to hire employment applicants with histories of short-term employment or earning substantially in excess of its wage rates. I also recommend that the Company be required to consider for hire Ed Devine, Rita Wood, Brian Vandenburg, Ed Morrison, Roger Osbourne, Dave Adams, Eugene Ramey and Dennis Sells and to provide backpay to the seven of them, whom it would have hired in January but for its unlawful conduct. In providing for such backpay, I shall recommend that the backpay for each discriminatee run from the date he or she would have been hired to the date that the Company makes a valid offer of employment to that discriminatee. Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, as the Company is engaged in the construction industry, I shall in accord with *Dean General Contractors*, 285 NLRB 573 (1987), leave to the compliance stage of this proceeding the determination of whether the seven discriminatees to be offered employment would have continued in the Company's employment after completion of the projects for which they would have been hired.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec.

ORDER

The Respondent, Payne Electric Company, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Maintaining and enforcing a policy which effectively precludes the hiring of union members because of their histories of short-term employment or their prior union wages.

b. Failing and refusing to consider for hire and failing and refusing to hire applicants on the basis of their union affiliation.

c. In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days of the date of this Order offer seven of the eight discriminatees the jobs which they were denied or, if those jobs no longer exist, to substantially equivalent positions at new job sites, if necessary and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them as set forth in the remedy section of this decision.

b. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

c. Within 14 days after service by the Region, post at its facility in Louisville, Kentucky copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed

102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 9, 1996.

d. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 5, 1998

Leonard M. Wagman
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain and enforce a policy that effectively precludes the hiring of union members because of their histories of short-term employment or their prior union wages.

WE WILL NOT fail and refuse to consider for employment or fail and refuse to hire applicants on the basis of their union affiliation.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of this Order, offer immediate employment to seven of the eight following applicants in the jobs for which they applied or, if those jobs no longer exist, to substantially equivalent positions at new job sites, if necessary, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them plus interest: Ed Devine, Rita Wood, Brian Vandenburg, Ed Morrison, Roger Osbourne, Dave Adams, Eugene Ramey and Dennis Sells.

PAYNE ELECTRIC COMPANY, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271, Telephone 513-684-3663.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

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WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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PAYNE ELECTRIC COMPANY, INC.

(Employer)

Dated _____ By _____

(Representative)

(Title)